Supreme Court of Kansas.

JOHN BRANDON *v.* MARY ANN BRANDON.

Upon granting a divorce, whether on account of the fault of the wife or the husband, the court has power to award to her the possession of the homestead.

When the record shows that a divorce was granted on account of the habitual drunkenness of the wife, this court cannot hold that it was error to give to her the care and custody of two infant children, in the absence of any evidence showing that the husband was a suitable person to have such care and custody.

THE court below granted to plaintiff a divorce on account of the fault of defendant, on the charge of habitual drunkenness, but awarded the defendant the care, custody, nurture and education of the two minor children of the said plaintiff and defendant, one three and a half years old and the other only one year old.

The court further decreed that the defendant should have and retain the possession of the homestead of the plaintiff during her natural life, and that the plaintiff should forthwith deliver possession of said premises to said defendant.

The court further adjudged that plaintiff should pay as further alimony $25 per month, and that there should be allowed, assigned and set-off to the defendant, to her own sole and separate property, all the clothing of herself and said two minor children, and all the household and kitchen furniture in said house, excepting two medium-sized bedsteads and the bedding thereof, to be retained by the plaintiff, and then adjudged that the defendant have and recover of and from the plaintiff the costs taxed at $204.97. From this decree the plaintiff appealed.

Art. XV., sect. 9, of the Constitution provides as follows:—

A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists.

By art. II, sect. 18: All power to grant divorces is vested in the District Courts, subject to regulation by law.

By the Statute of Kansas, Laws of 1870, sect. 27, p. 180, "If the divorce shall arise by reason of the fault or aggression of the wife, she shall be barred of all right of dower in the lands

of which her husband shall be seised at the time of filing the divorce, or which he may thereafter acquire, whether there be issue or not; and the court shall order restoration to her of the whole of her lands, tenements or hereditaments not previously disposed of, and also such share of her husband's real or personal property or both, as to the court may appear just and reasonable.

F. P. Fitzwilliams, for appellant.

The opinion of the court was delivered by

BREWER, J.—Upon this record two questions are presented. It is insisted in the first place that the court could not lawfully decree possession of the homestead to defendant during her natural life, and require plaintiff to vacate it. "It appears that the title to the homestead was in plaintiff, and the argument is that the defendant's interest in the homestead arose from her relation as wife to plaintiff; that when that relationship ceased, as it did by the decree of divorce, her rights and interest therein ceased, and the proporty remained as the absolute property of the husband; that it was his homestead, he remaining the head of a family; and that being his homestead, he could not, under the constitutional provision, be in this way forced to surrender it to any one. The argument is ingenious and forcibly put by counsel in his brief—but, we are constrained to say, is not sound. The divorce and the adjustment of property interests are not to be regarded as transpiring at different times, but as cotemporaneous. The homestead of the plaintiff is not given to a stranger destitute of all interest and right therein, but the homestead of the husband and wife (for it is equally the homestead of each) is upon their separation assigned to one of them. There would be manifest impropriety in attempting to continue it as the homestead of each after the divorce, and in awarding it to the wife the court is but choosing between conflicting interests. The fact that the title to the homestead property is in the husband, does not give to him any greater interest in it as a homestead. His deed of it conveys no more than hers. He can no more encumber or alienate it by a direct proceeding than she. Perhaps by contracting for improvements thereon he may have more power than she to make it liable to judicial sale, though thus only indirectly does he affect it. That he has even this power greater than she, we do not now positively decide, leaving the question to be examined and decided whenever

it is fairly before us. But whatever he may do directly or indirectly affecting the title, in so far as it is a homestead it is the homestead of each, and upon a divorce the court has power to assign it to either. The statute expressly gives to the court the power in case of a divorce, whether granted for the fault of the wife or the husband, to give to her such share of her husband's real or personal estate as shall be just and reasonable: Laws 1870, p. 180, sect. 27.

The assignment of the homestead to the wife is within the terms of this power, and if it be said that the protection of the Constitution is placed around a homestead, it may also be said that the power to grant divorces is also by the Constitution expressly given to the District Courts: Const. Art. II. sect. 18. And the constitutional grant of power to divorce is broad enough to include the power to determine the subordinate and dependent questions of the family property and the care and custody of the children. In this case we have only the question of power to determine, for as the testimony is not before us, we are unable to form any opinion as to the propriety of the assignment of the homestead to the wife.

As a second question in this case, it is asserted that it was error to award the custody of the children to one found to be an habitual drunkard. Here also we labor under the disadvantage of having none of the testimony bearing on this question before us. We cannot say that the court erred, because we do not know what facts were before it. The character of the husband, the associations by which he was surrounded, his constant absence from home, may have all been so shown in evidence as to make it apparent that it was unwise to give him the custody, and it may have been awarded to her as the least of two evils. We do not mean to say that any such testimony was introduced, for the record is silent thereon, but we do hold that unless it affirmatively appears that there was none such or similar, we cannot say that it was error to award the custody to the mother rather than to the father. The children were of tender years and needed a mother's care; and if she was at all suitable she ought to have the care of them during their infancy. The court reserved in the order, as it had the right to do, the power to change the custody; and if, after the children pass that age which especially demands a mother's care, her habits of drunkenness should continue, and the father appear to be a proper person to have the charge of them, we cannot doubt that the court

will modify its order and give him the custody. So far as the amount of alimony is concerned, we suppose it was intended for the benefit of the children rather than of the wife. The law does not intend that a woman unfit to remain the wife shall be supported in idleness by the toil of the husband. We however are not prepared to say that it was exorbitant, when the custody and care of the children are taken into the account.

Judgment affirmed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME JUDICIAL COURT OF MAINE.[2]

SUPREME COURT OF MICHIGAN.[3]

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[4]

SUPREME COURT OF PENNSYLVANIA.[5]

ADMIRALTY.

Practice—Review by Supreme Court—Liability of Towing-Boats for Accident.—Though on appeals in admiralty, involving issues of fact alone, this court will not, except in a clear case, reverse where both the District and the Circuit Court have agreed in their conclusions, yet in a clear case it will reverse even in such circumstances: *The Lady Pike*, 21 Wall.

The master of a steamer which undertakes to tow boats up and down a river where piers of bridges impede the navigation, is bound to know the width of his steamers and their tows, and whether, when lashed together, he can run them safely between piers through which he attempts to pass. He is bound also, if it is necessary for his safe navigation in the places where he chooses to be, to know how the currents set about the piers in different heights of the water, and to know whether, at high water, his steamers and their tows will safely pass over an obstruction which, in low water, they could not pass over: *Id.*

The owners of steamers undertaking to tow vessels are responsible for accidents, the result of want of proper knowledge on the part of their captains, of the difficulties of navigation in the river in which the steamers ply: *Id.*

---

[1] From J. W. Wallace, Esq., Reporter, to appear in vol. 21 of his Reports.

[2] From Hon. Edwin B. Smith, Reporter; to appear in vol. 63 Maine Reports.

[3] From Hoyt Post, Esq., Reporter; cases decided at February and April Terms 1875.

[4] From John M. Shirley, Esq., Reporter; to appear in 54 & 55 N. H. Reports.

[5] From P. F. Smith, Esq., Reporter; to appear in 76 Penna. Reports.